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Remarks

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Introduction

As you are all by now aware, Working Group III, which deals with legal, institutional and related matters, will play a central role in the preparations for the 1992 United Nations Conference on Environment and Development (UNCED).

To date, the Working Group has focused its efforts primarily in three areas:

- an evaluation of the effectiveness of existing agreements and instruments;
- the elaboration of legal principles to be included in the "Earth Charter" expected to result from the Conference; and
- a review of the role and functioning of the UN system in the environment area.

Today I would like to address three issues that have received little attention in the environmental field and consequently seem to have fallen into gaps in this agenda. However, they clearly concern both legal and institutional issues, and, as I hope to point out, may be of considerable utility in advancing the agenda of the

1992 Conference:

- the role of the public in the creation of international law;
- the role of the public in enforcing international law; and
- the potential utility of non-consensus decision-making procedures on the international level.

These issues are particularly timely today, when we stand poised on the brink of both negotiations on a number of multilateral environmental agreements as well as a wholesale review of the efficacy of international environmental mechanisms generally.

Domestic environmental lawyers can be excused for shock at the notion that there might not be a role for the public in international environmental processes. After all, as domestic lawyers and members of American society, we are accustomed to a variety of procedural rights in the formulation of our domestic environmental laws: notice of proposed regulations, the opportunity to comment on those proposals, the necessity for agency response to our comments, and, perhaps most importantly, the capacity to enforce all those rights against government rule-making agencies through suits for judicial review. Once regulations are in place, additional remedies in the form of the citizen enforcement actions created by most of the major environmental statutes allow members of the public to sue polluters not in compliance with environmental standards.

Moreover, in our domestic legal scheme, we are accustomed to the adoption of environmental policies through representative processes that we might generically describe as "legislative": that is, procedures that require some critical mass of agreement on the part of policy-makers, but not unanimity. Our environmental legislation is adopted by majority vote in both houses of the Congress. Unanimity among our elected representatives is not essential, nor is it necessarily even desirable.

On the international level, the situation is very different. Indeed, an international lawyer listening to this presentation might be excused for shock at the notion that there should be any role for the public in international environmental law. For a very long time, international law was defined strictly as the set of legal norms governing the relations among countries or nation-states, ordinarily as represented by their governments. Consequently, private entities had no procedural rights whatsoever, whether in informal bilateral discussions between two governments or in more formal multilateral processes at intergovernmental organizations like the United Nations. Some areas of international law, most notably the field of human rights, now acknowledge a role for the individual. Still, there is no known international human right to a healthy environment, and these developments generally have not penetrated to the environmental field.

Moreover, an international lawyer well might be appalled at the notion of non-consensus decisionmaking procedures. The international legal system assumes interactions among co-equal, sovereign nation-states. Legally binding obligations in the international legal system arise principally through consent. That consent can be expressly given, as in the case of adherence to a multilateral agreement, or implied, as in the development of customary legal obligations. For reasons of speed and precision in the creation and identification of obligations, in the environmental field the treaty route is of far greater significance than the development of customary norms.

Any country may decline to be bound by a multilateral agreement merely by withholding its consent. Further, decisions at most international conferences are taken by "consensus," which in practice implies unanimity. Any single reluctant country can eviscerate or thwart an effective agreement, whose obligations that country need not accept in any event. Consequently, effective international solutions to global environmental problems can be held hostage to the national imperatives of virtually every country on earth. The necessity for consensus in multilateral processes can create a built-in inertia, which well may produce disappointing "least common denominator" results that are not responsive to a particular problem. Even then, the obligations of an agreement may not enter into force for some time for lack of a critical mass of countries to accept them, an effect sometimes known as the "slowest boat" phenomenon.

The Law-Making Function and the Public

International legal standards in the environmental field are often much less well developed than in other areas of international law. Indeed, the international community is now very much absorbed with the process of creating environmental norms. For instance, the law of navigation has been well established for the better part of a century and was codified more than 25 years ago. By contrast, the first international agreements on such pressing environmental problems as exports of hazardous wastes and depletion of the stratospheric ozone layer have been concluded only in the last five years. Negotiations on the creation of the first and only international legal norms designed to protect the integrity of the Earth's climate are only now beginning. For this reason, if no other, the processes by which such international rules are created demand close scrutiny.

Resolution of many international environmental issues in an international context has significant benefits. A multilateral law-making process is a unique opportunity to craft world-wide, highly inclusive legal regimes that further critical environmental goals while simultaneously balancing the needs and expectations of all countries. Indeed, considerable multilateral law-making activity is taking place on regulatory issues in specialized fora such as the United Nations Environment Programme. These negotiations have a very different, and often more constructive, character than the acrimony associated with United Nations debates on issues of high political drama like the Middle East. Less well appreciated are the significant drawbacks that accompany the transfer of these issues from domestic to international fora.

Depletion of the stratospheric ozone layer, which protects life on the entire earth from harmful levels of ultraviolet radiation, is a compelling example. The Clean Air Act directs the U.S. Environmental Protection Agency (EPA) to respond by regulation if there is reason to believe that health and environment are endangered by human activities that deplete stratospheric ozone. Acting pursuant to this mandate, EPA in 1978 prohibited nonessential uses — such as spray aerosol propellants — of ozone-destroying chlorofluorocarbons (CFCs). This rule-making was accompanied by the ordinary procedural guarantees of notice by

publication of a proposed rule in the Federal Register, an opportunity for public comment, and a response by the Agency to public comments in the final regulation.

In the mid-1980s it became clear that this limited ban on a small number of uses of CFCs was insufficient to address major threats to the integrity of the stratospheric ozone layer, which by then was seriously disrupted by a continent-sized "hole" over Antarctica. This time the issue was treated in the first instance in a multilateral forum: UNEP. The resulting Montreal Protocol on Substances That Deplete the Ozone Layer is now an effective, potentially global solution to the problem of ozone depletion.

EPA implemented the Protocol through a domestic rule-making, much as it had the 1978 spray propellant ban. But this new rule-making was significantly different from the earlier one. This time, virtually all major issues had already been decided in the multilateral forum, where there was neither formal notice to the public nor formal opportunity to comment on the proceedings. By the time of the domestic rule-making, those rights were essentially meaningless, as all the significant legal requirements had been established in the Protocol. There also would be strong incentives for a reviewing court to decline to overturn the new regulation, which is necessary for compliance by the United States as a matter of international law with the obligations in the Protocol. Further, an exemption in the Administrative Procedures Act, the bedrock of American public law, arguably strips fundamental guarantees of access and accountability from this and many other multilateral negotiations, with serious consequences for the environment and public health in this country.

Serious problems like this resulting from the domestic implementation of international legal requirements are becoming more pervasive. Besides the stratospheric ozone issue, international trade in hazardous pesticides, chemicals, and industrial waste have all shifted from domestic agency rule-makings to multilateral processes. Results from the current round of negotiations on the General Agreement on Tariffs and Trade (GATT) may in fact open some environmental and public health regulations — such as those limiting pesticide residues in food — to international attack as non-tariff barriers to trade. Unlike a domestic rule-making, the GATT negotiations are highly secret and inaccessible to the public. As in the ozone example, there is likely to be no judicial review should the Executive Branch take an action contrary to law.

The pesticide residue issue is, moreover, considerably more insidious than the ozone example. The Montreal Protocol established a regulatory floor, leaving individual countries free to enact stricter measures. By contrast, the GATT negotiations could set a de facto regulatory ceiling, and stricter domestic measures designed to protect health and the environment could be a violation of international law. This same concern lies behind many environmental objections to the United States-Mexico Free Trade Agreement, which some fear might undermine domestic environment and public health legislation and regulations in the interest of harmonizing national and international standards.

The time has come to consider the creation of mechanisms to ensure the accountability of international legal processes such as the GATT and Mexico free trade negotiations directly to the public. Often on an ad hoc basis, some scientists, business people, and representatives of nongovernmental organizations have managed to carve out niches for themselves as observers or even advisers to multilateral processes. Nonetheless, practice among various international organizations and fora in this area is still erratic. For example, industry and trade unions have institutionalized roles in the Organization for Economic Cooperation and Development (OECD), but there is so far no opportunity for representatives of public interest environmental organizations to participate in their own right.

While the procedural requirements associated with domestic rule-making might be a starting point, perhaps an entirely different scheme would be necessary to respond to the peculiarities of the international legal system, as well as to the domestic legal systems of a variety of countries. In fact, on the international level there is at least one precedent that gives members of the public not just an opportunity to comment on, but an affirmative vote in, the law-making process. In the International Labor Organization (ILO), founded just after World War I, members of the public — in that case workers' and employers' organizations — are participating delegates to the annual International Labor Conference. The ILO's "tripartite" structure ensures that nongovernmental representatives at the Conference — which is the ILO's plenary body that adopts binding multilateral conventions — are equal to governmental delegates in total numbers.

In any event, the complexities of the task should not distract from the need for greater accountability as more and more issues that affect people's lives, livelihoods, and the very habitability of the planet are taken up in an international context.

The Enforcement Function and the Public

Unless they are enforced, legal rules — domestic as well as international — are only so many black marks on a piece of paper. Unfortunate experience, as during the Reagan era, has highlighted the serious lapses that can result from reliance on public authorities as the sole entities for enforcing the environmental laws. As a result, many of the federal environmental statutes empower members of the public to sue polluters directly for violations of those laws. In addition to creating a remedy for individual grievances, this "private attorney general" model of citizen enforcement furthers the public interest by encouraging strict compliance with applicable standards.

On the international level, there is also great, and perhaps increasing, concern for full compliance and adequate enforcement mechanisms. States undertaking major environmental obligations want to know that their partners in multilateral agreements are in fact implementing the same requirements. However, efforts by one nation-state to compel performance by another are often stymied by a variety of factors. Nation-states may be reluctant to initiate so-called "dispute resolution" procedures against other nation-states for a multiplicity of political reasons that may have nothing to do with the actual controversy. For example, until the recent agreement on air quality between the United States and Canada, there was nothing to prevent Canada from urging an international arbitration of the acid rain issue. Nonetheless, it probably goes without saying that such a proposal by the Government of Canada would be inextricably

linked with other political issues between the two countries that have nothing to do with the merits of the environmental issue. For similar reasons, there have been relatively few formal dispute settlement proceedings on environmental issues between nation-states on the international level.

There is nothing analogous to a citizen enforcement action on the international level in the environment field. Nonetheless, an ad hoc prototype that I like to refer to as "partnership advocacy" has recently grown up in the context of the ongoing debate over the environmental quality of lending operations by the World Bank and other multilateral development banks. Private Third World environmental advocacy organizations concerned about the activities financed by these international organizations in their own countries have created partnerships with similar American organizations, usually those located in Washington. The private United States organization, acting on behalf of the Third World partner as well as itself, then leverages policy change indirectly at the international institution through the United States Government, which in the case of the World Bank at least is the largest shareholder among member governments. Paradoxically, and often sadly, the indirect route by which Washington-based organizations act as interlocutor with the United States Government and the World Bank is often a more effective mechanism for achieving the goals of Third World environmental activists than dialogue with their own governments. However, as the partnership strategy acquires greater resiliency with increasing use, it has begun to provide an entry point into international decision-making processes by institutions that are notoriously stingy with information and otherwise virtually impenetrable to the public.

Notwithstanding its substantial success, the partnership advocacy model still provides strictly ad hoc remedies. From the point of view of Third World environmentalists, the necessity to speak through the mouth of a foreign organization to resolve important questions of environmental and public health policy in their own countries may be unsatisfying in practice and unsatisfactory as a matter of principle. These makeshift arrangements are not a substitute for direct access to meaningful remedies by those with a direct stake in the problem.

Loan agreements between the World Bank and a member country government are analogous to treaties and contain enforceable obligations. The Bank also has internal operating procedures and requirements that reflect evolving international standards in the areas in which the Bank operates. At present the only remedies for deviations by Bank professional staffers from their own operating procedures are wholly discretionary and totally within the hands of the World Bank's staff, who are often the very same individuals that negotiate and implement the loan agreement with the borrowing country.

A neutral adjudicatory mechanism would fill this gaping inadequacy in the existing international structure. In addition to creating a remedy for individual grievances, the adoption of a "private attorney general" model of citizen enforcement would, as in the domestic situation, further the public interest by encouraging compliance with applicable standards. Moreover, the creation of an adjudicatory mechanism to resolve grievances arising from the development assistance process would further the goals of accountability and empowerment at least as well as, and probably better than, the stopgap partnership model.

As in the case of the law-making function, there now is a need explicitly to address the role of the public in enforcing international environmental norms. There are a number of precedents for access by private parties to multilaterally-established mechanisms to adjudicate violations of treaty obligations by nation-states and failures to observe internal operating procedures by the staff of multilateral organizations. International human rights law creates remedies for private parties against nation-states before bodies such as the United Nations Commission on Human Rights, the United Nations Human Rights Committee, Commissions of Inquiry and other adjudicatory organs of the ILO, and regional courts and commissions, some of which have been highly successful in responding to complaints by individuals of human rights violations. There are likewise precedents for adjudicatory complaint mechanisms available to individuals to remedy infringements of the internal procedures of international organizations. Most international organizations, including the World Bank, have an administrative tribunal for adjudicating disputes, primarily employee grievances, between officials of the organization and the organization itself. The jurisdiction of this tribunal could be extended to encompass causes of action that could be initiated by members of the public. This modification would uniformly guarantee effective remedies to those harmed by activities undertaken by this public institution in dispensing public monies.

Non-Consensus Decision-Making Procedures

One way to overcome the "least common denominator" effect often observed in multilateral negotiations on environmental and other issues is through limited deviations from strict application of the principles of consensus and consent. As currently structured, the international legal system puts into the hands of every nation-state what amounts in extreme cases to a veto power over an entire international undertaking. For this reason, there recently have been calls for non-consensus decisionmaking procedures, particularly in the environmental field. The Declaration of the Hague, adopted in March 1989 by no fewer than seventeen heads of state, asserts the need for a new international body that would operate pursuant to "such decisionmaking procedures as may be effective even if, on occasion, unanimous agreement has not been achieved." Certain areas may be especially fertile ground for departures from the consensus model through the adoption of more streamlined, quasi-legislative processes that nonetheless afford individual nation-states guarantees that their needs will be met.

One area that is ripe for a deviation from the consensus principle is that of amendments to existing multilateral agreements. In the environmental area, in which the scientific knowledge underlying treaty provisions is often in a constant state of evolution, the reassessment of international obligations is often desirable if not necessary. Under customary international law, however, an amendment to a multilateral treaty is binding only on those nations that indicate their affirmative intent to accept those new obligations, ordinarily through ratification of the

amendment. Consequently, there is a serious risk that repeated amendment of an agreement in light of new scientific developments will result in the creation of classes of parties, each with its own configuration of obligations depending upon the amendments to which it has acceded. This danger is particularly grave in the case of complex, delicately balanced regulatory regimes like the Montreal Protocol.

The Protocol departs from the ordinary rule by specifying expressly that "adjustments" to the agreement's reduction schedule, which are binding on all states party to the instrument, may be adopted by a two-thirds majority instead of by consensus. At the time of the first review and assessment of the Protocol's efficacy, the precise meaning of "adjustment" was not clear. The parties to the Protocol adopted an interpretation worthy of Solomon, in which revisions to the reduction schedules for the eight chemicals now covered by the agreement are subject to the non-consensus adjustment process but the addition of new chemicals requires a full-blown amendment. Nonetheless, the precedent of the adoption of binding rules by qualified majority has been firmly established in the environment sphere.

Outside the environmental arena, non-consensus amendment processes are far from unprecedented. The World Bank's constituent treaties, for instance, provide for most amendments to become effective for all members upon approval by three-fifths of the Bank's members holding four-fifths of the total voting power. This means that at least in theory amendments to the Bank's constitutional instrument could be adopted over the objection of the United States, which holds less than twenty per cent of the voting power in the component institutions of the Bank. Likewise, the constituent agreements of the International Monetary Fund (IMF), the World Health Organization, and the World Intellectual Property Organization have amendment provisions that become effective for all members upon approval by a qualified majority.

Decisions taken pursuant to an established international — typically treaty — regime are a second area where non-consensus decisionmaking procedures may be particularly palatable. The Board of Executive Directors of the World Bank, for example, exercises just such a quasi-legislative authority in approving loan proposals by majority vote. The IMF, the regional banks, and the newly-created European Bank for Reconstruction and Development (EBRD) have similar majority voting procedures in their constitutional instruments.[1]

Majority processes may be especially desirable for highly scientific and technical matters that are often associated with other policy, legal, and economic issues in the environmental field. While not purely non-consensus processes, special streamlined provisions for technical matters have been adopted for the establishment of technical requirements under a number of maritime pollution agreements, most notably those for the protection of the Baltic and Mediterranean Seas. These agreements set up simplified processes for the adoption or amendment of technical annexes that require approval by only a qualified majority of nation-states. After a specified "opt-out" period, those actions then become binding on all nation-states that have not objected to them. It would be a small, but still significant, step to remove the "opt-out" provisions from these models. Indeed, the "adjustment" procedure for the adoption of modifications to the Montreal Protocol by qualified majority can be considered a special case of these precedents.

These proposals are far from radical. In fact, in the ILO scheme, in which members of the public serve as voting delegates, multilateral conventions themselves may be adopted by a qualified majority vote. Under the ILO's Constitution, the adoption of a convention then triggers an obligation for each nation-state to consider ratification of the agreement, even if every one of that nation-state's delegates to the Conference voted against the instrument. Further progress toward the adoption of non-consensus approaches might be assisted by assuring the integrity of the processes by which streamlined decisions must be taken. For instance, the role of scientific information and scientific uncertainty in the adoption of treaty amendments or technical requirements might be established. Procedures for challenging and reviewing non-consensus decisions and verifying scientific information — similar to our system of judicial review of administrative action, although not necessarily relying on courts for implementation — might be created for aggrieved nation-states. Alternatively, a nation-state bound by a decision with which that state disagrees might have the right to request early reconsideration of the action.

Conclusion

The urgency for access by the public to international law-making and law-enforcement mechanisms and the need for certain non-consensus decisionmaking procedures are well illustrated by, but by no means confined to, the environmental field. Nonetheless, in this, as in other matters, international environmental law well may be a paradigm that illustrates the potential of international law generally well into the next century. The recent explosion in the number of international meetings on the global environment, culminating in the 1992 United Nations-sponsored conference in Brazil, presents numerous opportunities for addressing procedural rights for the public and analyzing the effectiveness of international decisionmaking processes. But the intent behind UNCED goes one step further, in that that event is self-consciously designed to catalyze change on such pervasive issues of structure, institution, and principle.

Much of the preparatory work of UNCED has been taken up with excessively cumbersome, if not frighteningly daunting, tasks that may have little beneficial effect in the real world. If the global environment depends on mustering the political will to

1 With the exception of the EBRD, which is still too new, all of these institutions have come in for their share of environmental censure. In part, this criticism stems from the perceived concentration of power in these institutions' professional staffs, which in turn arguably derives from majority decision-making processes. However, environmental considerations do not necessarily counsel abandonment of majority voting procedures. Instead, solutions to these problems are more likely to come from greater accountability directly to the public through more openness in decision-making and improved opportunities for public participation.

redesign the current intractable United Nations system, then the prognosis for the future must be grim indeed. Similarly, a recent "Provisional List of Agreements and Instruments" published by the UNCED Secretariat identified more than 70 documents, with an exponentially enormous number of permutations of parties. Whether any meaningful review of, let alone alterations to, all these instruments can take place in the next year is highly questionable.

Instead, I believe that significant progress can be purchased quite cheaply through reasonably simple, forward-looking changes in the way we do business on the international level. Who could oppose strict enforcement of international environmental obligations? There is always considerable apprehension on the part of the United States — a country that prides itself on full implementation of its international legal obligations — with respect to observance of treaty obligations by our treaty partners, particularly when there is a potential for competitive disadvantage. Putting the tool of enforcement in the hands of the public in, say, the draft greenhouse gas convention would further the national interest in full global compliance while simultaneously advancing the cause of environmental quality. But an international forum, while perhaps desirable, is by no means necessary for progress in these areas. It may be appropriate to consider, as a strictly domestic matter, the unilateral creation by statute of APA-like requirements for the Executive Branch agencies engaged in certain international processes. Whether changes are initiated by national governments acting domestically, national governments acting in the international arena, or by international organizations themselves, the need for progress in this previously neglected area no longer can be ignored.